

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MISTI J. SWANK

Claimant

VS.

NORTHEAST OHIO COMMUNICATIONS NETWORK

Respondent

AND

TRAVELERS CASUALTY AND SURETY COMPANY

Insurance Carrier

Docket No. 1,064,232

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the June 21, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Dennis L. Phelps of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 16, 2013, preliminary hearing and exhibits thereto; the transcript of the April 2, 2013, deposition of Eric Tobin and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

On January 29, 2013, claimant slipped on a restroom floor and sustained head and back injuries. At the time, claimant was on a scheduled break from her job with respondent. Respondent's business is located in a single office space inside a former mall that has been converted to an office building. The restroom where claimant fell was located down a hallway outside respondent's office and was used by employees of other businesses located in the office building.

Claimant alleges she sustained head and back injuries when she was: (1) on a personal comfort break while working for respondent, (2) on the clock, (3) using a restroom designated by respondent to take breaks and (4) never left her employment duties when

the accident occurred. Consequently, claimant asserts she met with personal injury by accident arising out of and in the course of her employment with respondent.

Respondent asserts claimant's injury by accident did not arise out of and in the course of her employment. Respondent contends that at the time of her accident, claimant was not on respondent's premises or in an area that was under respondent's control, was on break and was on her way to assume her duties with respondent. Therefore, under the "going and coming rule," claimant's injuries did not arise out of and in the course of her employment.

In its application for review, respondent asserted that the ALJ exceeded her authority by authorizing Dr. George G. Flutter as claimant's treating physician. However, respondent failed to address that issue in its brief to the Board and, therefore, the Board deems that issue abandoned.

The ALJ authorized Dr. Flutter to provide claimant medical treatment, ordered respondent to pay claimant's outstanding and related medical expenses and temporary total disability benefits and found:

The Court finds that claimant was taking a break in an area designated by her employer for smoke and restroom breaks. Although the restroom was not inside the claimant's office, there was a degree of control sufficient to find the accident compensable.¹

The sole issue on appeal is: did claimant sustain a personal injury by accident arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Eric Tobin, chief executive officer and half-owner of respondent, testified that respondent entered into an Occupancy License Agreement (OLA) with Office This, LLC. The OLA provides that respondent may use office space, amenities and services located at 4031 East Harry, Wichita, Kansas 67218, known as the Office Facility. The OLA states respondent will have use of Room 53² and amenities described in Exhibit A. Exhibit A lists, among other amenities: use of desktop computers and telephones in Room 53; free

¹ ALJ Order at 1.

² Claimant referred to the office space occupied by respondent as Office 53, but respondent's chief executive officer, Eric Tobin, and the Occupancy License Agreement referred to the office space as Room 53.

access to 20+ fully equipped conference rooms on a first-come, first-served basis or by appointment; free concierge service to reserve meeting and training rooms, schedule meetings and set up audio, web and video conferences; and 24-hour access to only the Hall of Mirrors after normal business hours. Exhibit A does not mention the restrooms or use of the common hallways.

Mr. Tobin testified that although the OLA ended on August 1, 2012, respondent and Office This continued to operate under the terms and conditions of the OLA on a month-to-month basis. He indicated that Office This cleaned Room 53, the restrooms and provided toilet paper for the restrooms. Mr. Tobin indicated that respondent had no control over the common areas of the Office Facility, including the restrooms. The following testimony of Mr. Tobin is significant:

Q. (Mr. Phelps) So as I understand it, your arrangement, then, with Office This basically encompasses Office This providing all the facilities that you are going to use, including the Room 53 itself and, of course, the restroom and Hall of Mirrors, all of that; fair statement?

A. (Mr. Tobin) Yes, that's fair.³

Mr. Tobin has never been in respondent's Wichita office.

Claimant testified she was a telemarketer for respondent located within an office known as Room 53. Eight telemarketers and claimant's supervisor, Kevin Harrison, worked in the office. Room 53 was located in what was called the "Hall of Mirrors," presumably because the hall had numerous mirrors hanging on the walls. Claimant testified that respondent provided no maintenance or cleaning for its office space as she never observed respondent's employees providing those services. Claimant indicated Office This provided maintenance and cleaning for Room 53, the hallways and common restrooms, including the one where claimant fell. Claimant testified that on occasion, respondent would hold meetings in different suites within the Office Facility, but outside of Room 53.

At break time, claimant would exit Room 53, turn left and go down the hallway to get to the smoking area. According to claimant, she was instructed by Mr. Harrison that she take a smoke and restroom break at 10:10 a.m. and 3:10 p.m. each day. Claimant was told to exit Room 53 and an exterior door of the Office Facility and take a brief smoke break outside the building. She was then to use the common restroom that was approximately 10 to 15 feet from Room 53 and come right back to work.

³ Tobin Depo. at 36.

On January 29, 2013, claimant was on her morning break and had just finished her smoke break and entered the restroom. As she approached the restroom stall, claimant slipped on the floor, which was wet, striking her head and back on the concrete floor. Claimant could not get up and used her cellular telephone to call Mr. Harrison, who sent a co-worker to assist claimant. An ambulance was called and claimant was taken to St. Joseph Hospital. Claimant is pursuing a civil claim against Office This.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”⁵

K.S.A. 2012 Supp. 44-508(f)(3)(B) states:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

Respondent asserts that claimant was on her way back to work when her injury occurred and, therefore, under K.S.A. 2012 Supp. 44-508(f)(3)(B), claimant's injuries are not compensable. Respondent also asserts that it did not own or have under its exclusive control the restroom where claimant was injured.

Respondent's arguments ignore a long line of cases that deal with workers who are injured while on break and the “personal comfort” doctrine. In *Wallace*,⁶ Wallace was

⁴ K.S.A. 2012 Supp. 44-501b(c).

⁵ K.S.A. 2012 Supp. 44-508(h).

⁶ *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

injured while standing outside an office building on a cigarette break when someone opened the door from inside the building and the door struck her. Sitel, Wallace's employer, leased a suite of offices in a building owned by a lessor. On appeal, Sitel argued that because Wallace was on break when the accident occurred and not on Sitel's premises, the injury was not compensable. The Board found Wallace's injuries arose out of and in the course of her employment, stating:

A general rule given by Larson's regarding off premises coffee or rest breaks is:

If the employer, in all circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment. [Footnote citing Larson's at § 13.05, page 13-62.]⁷

In *Wallace*, the Board also noted that coffee and smoking breaks benefitted both the employer and employee and fall within the personal comfort doctrine.

The Board made a similar ruling in *Roath*.⁸ Roath went on a short break to retrieve her purse from her automobile that was in a parking lot used by ASR's employees, but not owned by ASR. Roath fell and was injured as she was returning to the building where she worked. The Board found Roath's injuries arose out of and in the course of her employment, stating:

In circumstances where the employee is taking a break in an area designated or permitted by the employer for such purposes, even if it is not on the employer's premises, there is also a degree of control sufficient to find the accident compensable. [Footnote citing *See Larson's Workers' Compensation Law* § 21.02 (2006); *Riley v. Graphics Systems, Inc.*, No. 237,773, 1998 WL 921346 (Kan. WCAB Dec. 31, 1998).]⁹

Here, respondent directed claimant where, when and how to take her breaks. There is no evidence that claimant was required to clock out during her breaks or that claimant was doing something on her break prohibited by respondent. Claimant was following respondent's instructions to smoke, use the restroom and return to work as quickly as possible. The breaks, twice a day, were for the personal comfort of claimant and benefitted both claimant and respondent. Accordingly, this Board Member finds that

⁷ *Id.*

⁸ *Roath v. ASR International Corporation*, No. 1,032,944, 2008 WL 651675 (Kan. WCAB Feb. 18, 2008).

⁹ *Id.*

claimant sustained personal injuries by accident arising out of and in the course of her employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, the undersigned Board Member affirms the June 21, 2013, preliminary hearing Order entered by ALJ Barnes.

IT IS SO ORDERED.

Dated this ____ day of September, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Nelsonna Potts Barnes, Administrative Law Judge

¹⁰ K.S.A. 2012 Supp. 44-534a.

¹¹ K.S.A. 2012 Supp. 44-555c(k).